The Catholic Lawyer

Volume 13
Number 3 *Volume 13, Summer 1967, Number 3*

Article 9

December 2016

# Attorney's Withholding of Tangible Evidence of Crime Held Not Protected by Attorney-Client Privilege

# RECENT DECISION

**Attorney's Withholding Of Tangible Evidence Of Crime Held Not Protected By Attorney-Client Privilege.**

An individual accused of armed robbery sought the legal aid of defendant, an attorney. After consulting prominent lawyers for advice, defendant transferred the weapon and stolen money from his client's safe deposit box to his own pursuant to a power of attorney which authorized him to "so dispose of the said contents as he sees fit. . . ." He intended to assert the attorney-client privilege in an attempt to exclude the items from evidence if discovered by the authorities, and thereby significantly burden the prosecution's case. He planned to give the money to the proper authorities only after his client's interests were sufficiently protected. In a proceeding instituted against him for unprofessional conduct, the United States District Court, Eastern District of Virginia, en banc, suspended defendant for eighteen months, *holding* that his conduct, being outside the bounds of state and federal law, was a violation of the Canons of Professional Ethics of the Virginia State Bar. The Court further held that defendant could not successfully claim the protection of the attorney-client privilege. *In re Ryder,* 263 F. Supp. 360 (E.D. Va. 1967).

At the turn of the century, the legal profession became the subject of much criticism, emanating from within and without the profession, concerning its need to modernize and codify its standards of ethics.[1] In response to this criticism, and inspired by the adoption of codes of ethics in several states,[2] the American Bar Association in 1908 adopted the Canons of Professional Ethics.[3] The by-laws of the Association were then amended to authorize the creation of a Committee on Professional Ethics and Grievances to express opinions concerning interpretation of the Canons when consulted by mem-

---

[1] COMMITTEE ON LEGAL EDUCATION AND ADMISSION TO THE BAR, REPORT, 20 ABA REP. 349, 377 (1897).

[2] COMMITTEE ON CODE OF PROFESSIONAL ETHICS, REPORT, 31 ABA REP. 676 (1907).

[3] 33 ABA REP. 55-86 (1908). The original draft consisted of thirty-two canons. An additional thirteen canons were adopted in 1928, Canon 46 in 1933, and Canon 47 in 1937. H. DRINKER, LEGAL ETHICS 24-26 (1953).

bers of the bar or any officer or committee of a state or local bar association.[4]

Among the original thirty-two canons adopted in 1908 was Canon 15 entitled, "How Far a Lawyer May Go in Supporting a Client's Cause," which states that "[t]he lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability,' to the end that nothing be taken or be withheld from him, save by the rules of law, legally applied." The canon warns, however, that this loyalty and enthusiasm of the attorney does not justify disloyalty to the law or the dictates of his conscience. The lawyer's duties are "to be performed within and not without the bounds of the law." The attorney "must obey his own conscience and not that of his client." For example, the advocate cannot properly allow his name to be used in order to promote his client's business,[5] for to do so would contravene Canon 29.[6]

The attorney-client relationship is further clarified by Canon 37 which declares that the lawyer is "to preserve his client's confidences." This doctrine was originally formulated in the early common law, dating from the time of Elizabeth I.[7] During the 17th century, the integrity of one's vow of secrecy, given to another in exchange for a disclosure, was often protected by the courts. A witness could assert the vow as grounds for refusing to answer a question.[8] At this time in history, the confidence between attorney and client was also predicated upon this "point of honor," rather than on any of the policy considerations which are offered today to justify the privilege. As a logical consequence, it followed that the privilege could be waived by the attorney, for he was the one who took the pledge of secrecy, expressly or impliedly, and it was his obligation of honor which the court was preserving.[9] If public esteem were unimportant to him he could infamously breach his vow.

In the eighteenth century this theory was abandoned [10] and a new explanation had to be offered for the privilege if it was to continue. It was, and still is, argued that the privilege is essential to promote freedom of consultation with legal advisers by clients.[11] The services of a lawyer are often indispensable to the vindication of one's legal rights and only if the attorney is immune from compelled disclosures will the client be able to effectively utilize the counsel's services. If the fear of divulgence constantly overshadows the client, he instinctively will withhold from his attorney information he desires to keep secret, and in so doing will frustrate his attorney's attempts to assert all the legal remedies and protections

---

[4] H. DRINKER, *supra* note 3, at 30-32.

[5] ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 76 (1932).

[6] Canon 29 provides that a lawyer "should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve not only the law but the administration of justice."

[7] 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton ed. 1961).

[8] *Id.* at § 2286.

[9] 8 J. WIGMORE, EVIDENCE, *supra* note 7.

[10] *Ibid.*

[11] 25 S. CAL. L. REV. 237, 239 (1952). *See* Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487 (1928).

afforded a person in the client's position.

The following has been offered as a statement of the privilege containing all the essential elements:

> (1) *Where legal advice of any kind is sought* (2) *from a professional legal adviser in his capacity as such,* (3) *the communications relating to that purpose,* (4) *made in confidence* (5) *by the client,* (6) *are at his instance permanently protected* (7) *from disclosure by himself or by the legal adviser,* (8) *except the protection be waived.*[12]

It should be emphasized that communications between the attorney and his client are the subject of the protection, and it is necessary to delimit the extent to which the word "communications" is applied in order to define the scope of the privilege. For the purpose of discussing the instant case, the query may be confined to answering the question of whether chattels handed over to the attorney, by the client, as part of the communication between the two, relating to professional advice, is encompassed by the privilege.

Canon 37 does not specifically limit the attorney's duty to preserve his client's confidences to oral communications. It has been argued that the policy considerations which are presented to justify protection of oral communications are likewise present when a chattel is handed over to the attorney by the client.[13]

However, the courts generally do not adopt this approach. In determining whether the client's chattel which is in the attorney's hands is immune from compelled presentations before the court, agency principles are applied irrespective of the attorney-client privilege.[14] If the client can be subjected to a legal search and seizure, the attorney cannot assert the attorney-client privilege to exclude the evidence. The chattel enjoys no greater protection while in the possession of the attorney than it did while in the possession of the client. To hold otherwise would enable a suspect legally to exclude incriminating evidence by merely entrusting the items to his attorney.[15]

In the instant case,[16] the legal services of defendant were sought by one Cook who was accused of armed robbery. Agents of the Federal Bureau of Investigation had confiscated $348 from Cook when defendant arrived at his client's home. Later in the day, defendant was informed by one of the agents that some of the bills which had been taken from Cook were identified as a portion of the stolen money. Although Cook did not confess, defendant never fully believed his alibi.

The balance of Cook's money remained in a safe deposit box he rented in a local

---

[12] 8 J. WIGMORE, EVIDENCE § 2292 (McNaughton ed. 1961). For a statutory definition *see* N.Y. CPLR 4503(a). For a compilation of statutes in other jurisdictions, *see* 8 J. WIGMORE, EVIDENCE § 2292 n.2 (McNaughton ed. 1961).

[13] *See* Comment, *Fruits of the Attorney-Client Privilege: Incriminating Evidence and Conflicting Duties,* 3 DUQUESNE L. REV. 239, 242 (1965).

[14] 8 J. WIGMORE, EVIDENCE § 2307 (McNaughton ed. 1961).

[15] *Ibid.*

[16] *In re* Ryder, 263 F. Supp. 360 (E.D. Va. 1967).

bank. Disturbed as to what should be done with this money, defendant consulted a former officer of the local bar association and informed him of his idea of transferring it from Cook's safe deposit box to his own, believing that this would prevent Cook from disposing of it. Thus, defendant hoped to claim the attorney-client privilege if the money were found by the authorities. In this manner, he hoped to exclude the balance from evidence, break the link between Cook and the stolen money, and destroy the presumption of guilt which possession of the money would create. His colleague approved of the idea so long as it was not done surreptitiously, and that defendant inform his client that the money would be going back to the rightful owners. Defendant prepared a power of attorney authorizing him to enter Cook's safe deposit box, remove the contents, "and so dispose of the said contents as he sees fit. . . ." [17] He did not follow the advice he had received to tell Cook that the money was to be returned, testifying, somewhat nebulously, that to do so specifically in the power of attorney might jeopardize the confidence of his client. He felt that he was sufficiently protected by the more general declaration of authority quoted above, planning to "dispose of the said contents as he sees fit," namely, returning it to the rightful owner, at whatever time he deemed that it would not hurt Cook.

When defendant opened Cook's box, he found not only the money, but also a sawed-off shotgun which he knew reportedly had been used in the bank robbery of which his client was accused. Nevertheless, he transferred all the contents of Cook's box to his own. Within a half-hour of the transfer, defendant consulted a retired judge who was then a distinguished professor of law and informed him of his actions because he wanted responsible people of the community to know his motives.

Cook eventually was indicted for robbery, and after Federal Bureau of Investigation agents searched Cook's and defendant's boxes and discovered the incriminating evidence, the court removed defendant as Cook's attorney and suspended him from practice before the court until further order. Within five days, the United States Attorney initiated disbarment proceedings against defendant for violations of Canons 15 and 32.[18]

In disbarment proceedings, the rule laid down in some cases is that the alleged wrongdoing must have been intentional in order to constitute cause for the disbarment of an attorney. Not only must the act itself be proven to have been committed, but the bad or fraudulent motive for the commission thereof must be established, and unless this is done disbarment is not authorized.[19]

The Court concluded that these requirements were satisfied in the instant

---

[17] *Id.* at 363.

[18] The State of Virginia has adopted the ABA Canons.

[19] *In re* Lasecki, 358 Ill. 69, 192 N.E. 655 (1934); *In re* Zanger, 266 N.Y. 165, 194 N.E. 72 (1935). The court, in *In re* Donaghy, 402 Ill. 120, 123, 83 N.E.2d 560, 562 (1949), explained:

> The legal calling is a time-honored profession and the courts owe a duty to protect the public from impositions and improper

case.[20] It was reasoned that defendant took possession of the money, knowing the same to have been stolen, and the shotgun, cognizant that it was an instrumentality of the crime, intending to conceal the items until his client was sufficiently protected and thus attempt to frustrate the government's efforts to successfully prosecute Cook. No statute or canon of ethics was considered to have justified defendant's activities and thus altered the nature of his motive.[21]

The Court easily rejected the contention that defendant was unaware that the money was stolen.[22] He knew that the man who committed the robbery used a sawed-off shotgun and was well advised of his client's guilt when he found the shotgun in Cook's box and was informed that some of the bills in Cook's possession were identified as bait money from the bank.[23] Quoting from *United States v. Werner*,[24] and *Melson v. United States*,[25] the Court recognized that the extent of the defendant's "knowledge" that the money was stolen need only have been enough to allow him to draw a reasonable inference of such fact, and not of such a degree as to enable him to testify in court.[26] Therefore, defendant was found to have violated state law [27] by concealing goods known to have been stolen, and in so doing contravened Canon 15, which states that the lawyer must assist his client within the bounds of the law, and Canon 37, which denies the lawyer the right to render service involving disloyalty to the law.

No merit was found in the contention that defendant was acting within the bounds of the attorney-client privilege for defendant's "conduct went far beyond the receipt and retention of a confidential communication from his client," which is all that the privilege purports to protect.[28]

Defendant also relied upon case authority which denied the government the right to subpoena an attorney to produce client's papers which were inadmissible in court due to the client's fourth and fifth amendment rights, *i.e.*, these cases held that the attorney was allowed to assert his client's constitutional privilege.[29] The Court held that the argu-

---

practices. . . . Such duty, and the manner in which it is exercised, must not be despotic, but the charges must be sustained by clear and convincing proof and the misconduct must be shown to have been fraudulent and the result of improper motives, and the proof must show intent.

[20] *In re* Ryder, 263 F. Supp. 360, 361 (E.D. Va. 1967).

[21] *Id.* at 369.

[22] *Id.* at 364-65.

[23] *Ibid.*

[24] 160 F.2d 438, 441 (2d Cir. 1947).

[25] 207 F.2d 558, 559 (4th Cir. 1953).

[26] *In re* Ryder, 263 F. Supp. 360, 364-65 (E.D. Va. 1967).

[27] VA. CODE ANN. § 18.1-107 (1950): "If any person buy or receive from another person, or aid in concealing, any stolen goods or other thing, knowing the same to have been stolen, he shall be deemed guilty of larceny thereof. . . ."

[28] *In re* Ryder, 263 F. Supp. 360, 365 (E.D. Va. 1967).

[29] *See, e.g.*, United States v. Judson, 322 F.2d 460 (9th Cir. 1963); Schwimmer v. United States, 232 F.2d 855 (8th Cir. 1956). *Contra*, Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963). For a discussion of the attorney's right to assert his client's constitutional privileges and of the *Judson* and *Bouschor* holdings, *see* Note, *The Attorney and His Client's Privileges*, 74 YALE L.J. 539 (1965).

ment was faulty because defendant's client had no constitutional right to refuse to produce the evidence in question. Since the attorney's claim of privilege is derived from his client, defendant had no privilege to assert.[30] The Court drew the now well-established distinction between merely evidentiary materials which may not be seized, and those instrumentalities and fruits of crime which may be validly seized.[31]

The Court dealt rather harshly with the efforts of an attorney to act prudently and to respect the often conflicting duties owed to the court, of which he is an officer, and to his client, for whom he is an advocate. The lawyer's activity is often judged by different and conflicting standards which produce varying solutions and appraisals, and this state of affairs creates such uncertainty and disillusionment within the profession as to be a contributing factor to the apathy and public criticism of the profession.[32]

A superficial glance at the Canons will reveal many inherent conflicting duties which can prompt numerously troublesome ethical problems for the advocate. As has already been seen, Canon 37 establishes "the duty of a lawyer to preserve his client's confidences," while Canon 15 warns that the advocate must operate within the confines of the law. The Committee on Professional Ethics and Grievances [33] has already stated that the lawyer, aware of the location of his fugitive client who has broken bond, should not divulge such information to the authorities who are seeking to arrest him.[34] Yet, one who knows that a person is being sought by law enforcement officials for the commission of a crime, himself commits a crime if he, with intent to delay or hinder discovery, conceals such person, or prevents or obstructs another by means of deception, from performing an act which might aid in the discovery of the accused.[35]

Further confusion is added by a 1936 opinion of the Committee which states that an attorney's knowledge of the whereabouts of his client who has jumped bail, fled the jurisdiction of the court, failed to appear for trial, and remained without the jurisdiction is not privileged.[36] The Committee refused to admit that this opinion overruled the former, but merely said that, on the facts, the opinions are not in conflict. The rationale of the latter opinion hinges upon the nature of the client's activity, characterized as a "continuing wrong," and the communications relating thereto not being privileged by the express provision of the canon itself.[37] The Committee states that "[w]hen the

---

[30] *In re* Ryder, 263 F. Supp. 360, 366 (E.D. Va. 1967).

[31] *In re* Ryder, 263 F. Supp. 360, 366 (E.D. Va. 1967). The Court quoted from Harris v. United States, 331 U.S. 145 (1947); *see* 8 J. WIGMORE, EVIDENCE § 2264 (McNaughton ed. 1961).

[32] *See* Starrs, *Attorneys in Doubt*, 8 CATHOLIC LAW. 131 (1962).

[33] Hereinafter referred to as the Committee.

[34] ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 23 (1930).

[35] N.Y. REV. PEN. LAW §§ 205.50-.65 (effective Sept. 1, 1967).

[36] ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 155 (1936).

[37] "The announced intention of a client to commit a crime is not included within the confidences which he [the lawyer] is bound to respect." ABA CANONS OF PROFESSIONAL ETHICS, No. 37.

communication by the client to his attorney is in respect to the future commission of an unlawful act or to a continuing wrong, the communication is not privileged." [38] The canon clearly justifies the Committee's remarks concerning the intent to commit an unlawful act. However, the removal of "continuing wrongs" from the protection of the privilege was an attempt by the Committee to supply a missing element to the Canons, in order to reach the conclusion believed to be proper.

The above is offered as an example of the difficulties that may arise in interpreting only one of the Canons. Interpretative difficulties like these permeate the entire code, most of the problems being created by the gross vagueness of the provisions. These inexact pronouncements are made the basis for disbarring an attorney, and it is questionable why a group of lawyers, who would painstakingly work to draft a concise and clearly defined criminal statute, able to withstand the rigorous tests of the due process clause, would throw together such an imprecise code to guide their own activities and supply the grounds for disbarment for the deviation therefrom. It would be expected that where their own interests are so significantly affected they would afford themselves the clearest definition of the conduct which would warrant disciplinary action.

As a rebuttal to the argument for a more narrowly drafted set of canons, it may be contended that a detailed code may encourage lawyers to go as close to the line as possible without violating the provisions. Only a broadly worded code would give a court the flexibility often needed in dealing with borderline activities of attorneys. However, at present, a lawyer, faced with a perplexing ethical problem, consults the Canons for help and witnesses a hodgepodge of conflicting precepts which patently require him to serve two masters, offering no reconciliation for the situation where the interests of the two masters clash. Cognizant of the relatively low percentage of lawyers who are actually disbarred from practice,[39] and of the rigorous task that is incumbent upon the government to establish its case, the lawyer is tempted to "gamble," believing that the probability is against the propriety of his actions ever being questioned. Vague canons are more susceptible to manipulation to rationalize one's questionable activities.

As an escape, the lawyer should more often consult the ethics committee of the local bar association. The larger associations publish their opinions, which are readily available to members. These opinions apply the vague precepts of the Canons to specific factual patterns, and offer a solution which establishes a prece-

---

[38] ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, NO. 155 (1936).

[39] *See* N.Y. JUDICIAL CONFERENCE, ADMINISTRATIVE BOARD, Report, 409 (1967), wherein the following statistics are given, showing the results of disciplinary proceedings in New York State during the judicial year from July 1, 1965 through June 30, 1966:

| | |
|---|---|
| Disbarments | 14 |
| Struck from roll | 14 |
| Suspensions | 12 |
| Censures | 13 |
| Charges Dismissed | 5 |
| Reinstatements | 10 |

dent. To those who argue that it is essential for the Canons to be vague and flexible in order to be effectively applied to the difficult and varied factual situations which may arise in the future, it can be asked: Is it not true that the continued process of construction and application of the Canons, which is exercised by the various ethics committees, tends to more precisely define the scope of each provision and, in effect, redraft, in a rather haphazard manner, the existing code into one which is of the very kind which they criticize? Are not each of the opinions of the committees to be read in conjunction with the Canons and to be evaluated and weighed on the scales while seeking a proper balance between the interests of the varying parties that influence the lawyer, *i.e.*, are not the specific holdings of the committees to be adhered to as much as the Canons proper? Is not this process akin to that exercised by the United States Supreme Court in construing another intentionally vague document, the federal constitution, where the Court in recent years has construed the subject of its construction with such specificity as to be tantamount to the process of legislating? [40]

Turning our attention from some of the inadequacies of the Canons, a discussion of the predicament in which defendant found himself seems appropriate. It has been argued that, for the same reasons which justify the attorney-client privilege as applied to oral communications, incriminating chattels which are given to the attorney by the client should enjoy the same protection of confidentiality and immunity.[41] The spoken word is but a symbolic utterance relating to a physical or spiritual entity or event perceived by the mind. The utterance in and of itself is meaningless; it is its symbolic character which constitutes the bulk of its value as a tool of man. Some seem satisfied by merely stating that the chattel is corroborative proof of the validity of what the client orally tells his attorney. If the latter is protected, it is urged, the former should be also.[42]

If this argument be accepted it would logically follow that defendant could not be said to have violated the Canons because of his possession of the stolen money. As previously discussed, the Committee has held that the attorney is not required to disclose the whereabouts of his fugitive client who has broken bond, despite the fact that he may be violating a statute by hindering prosecution.[43] The attorney is protected because he has acted in accordance with the requirements of the attorney-client privilege. Following this reasoning, defendant would not be held accountable for violating the Virginia possession of stolen goods statute

[40] *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Watkins v. United States, 354 U.S. 178 (1957).

[41] Comment, *Fruits of the Attorney-Client Privilege: Incriminating Evidence and Conflicting Duties*, 3 DUQUESNE L. REV. 239, 242 (1965).

[42] "Like a photograph used in a court to pictorially convey a witness' testimony, incriminating evidence produced by a client is the real, actual, or demonstrative communication of a secret or confidence. It is a visual communication of a secret or confidence. In a sense, it is the corroborative proof of what the client tells in the strictest of confidence." *Ibid.*

[43] ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 23 (1930).

because his conduct would be in accordance with the Canon concerning confidentiality. To those who would say that this is practicing a fraud on the court, attention need only be directed to Opinion 287 of the Committee, wherein it was held that an attorney need not disclose to the court the subsequent revelation that his client perjured himself in a divorce proceeding.[44] The interest of the client prevailed over that of the court.

It must be admitted that there is one significant difference between the fact patterns of the fugitive and perjury situations and that of the *Ryder* case. In the former instances the attorney passively resisted prejudicing his client's interests by failing to assist in discovering the whereabouts of his client, or informing the court of the subsequently discovered fraud perpetrated on it. Most would agree that if, in the fugitive case, the attorney took affirmative steps to aid the flight of his client, such as allowing him to use his home as a sanctuary, or in the perjury case, he actively participated in deceiving the court, his conduct would be unquestionably reprehensible. And yet it has been suggested that if the attorney-client privilege were extended to chattels, Ryder's conduct could be justified despite his positive efforts to conceal the stolen goods.

In objective fairness to this line of reasoning, it should be emphasized that there is a very basic difference between an oral communication and a physically existing chattel. When the client verbally communicates with his attorney, the words, once uttered, are clandestinely stored within the mind of the advocate, unobservable by the senses of another human being. When a law enforcement agent approaches the attorney and asks him the whereabouts of his client, the attorney can effectively protect the interests of his client without taking any affirmative action. He merely can refuse to assist, while asserting the attorney-client privilege. If the attorney refuses to cooperate, there is no way in which the communication may be revealed.

But if for the sake of argument the privilege be extended to chattels, where the client hands the items to the attorney, they are still perceivable by the senses of other persons. If the privilege is to be at all meaningful, the attorney is forced to take affirmative steps to conceal their existence and thereby honor the confidences of his client. Of what practical value would such a privilege be if the client placed the items in question upon the lawyer's desk while the lawyer was acting in his professional capacity, and it was necessary that they remain exposed because the attorney could not take positive action to conceal them? The client would be prejudiced because he divulged the existence of the chattels under the guise of the protection of the attorney-client privilege.

It would be unsatisfactory to conclude that it is unnecessary for the attorney to conceal them at all by arguing that if the evidence were confiscated, the attorney could assert the privilege and exclude the items from evidence anyway. The client should not be exposed to the added risk that his case will be further burdened by knowledge of the incriminating items because he attempted to apprise his at-

[44] ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 287 (1953).

torney of all the circumstances of the case.

Unfortunately for defendant, the courts have refused to be so conceptual and extend the attorney-client privilege to chattels. As previously indicated, the attorney-client relationship is treated as any other agency relationship when determining whether the attorney may exclude from evidence his client's chattels in his possession. The courts are unwilling to allow the privilege to be indiscriminately and abusively used as a shield to allow criminals to legitimately exclude incriminating evidence, not constitutionally protected, by merely giving it to an attorney. The importance of this policy strongly outweighs that of the privilege.

The non-existence of the privilege leaves unprotected the activities of one in defendant's position. There exists no explanation, such as a professional confidence, for the violation of the state statute. The holding of the Court appears to stand on solid ground. The money and weapon do not come within the privilege, and defendant's possession thereof violated the law and, in turn, the express provisions of the Canons. Consequently, an attorney, approached by a client who has committed a robbery, cannot ethically or legally take possession of the stolen goods or the weapon.

The question then arises as to what the attorney should do. Before attempting to answer this question, it is advisable to emphasize that we are operating under the adversary system. The two opposing counsel compete with one another, the by-product of the process hopefully being truth and justice.[45] One of the basic concepts of criminal law is that the prosecution must prove, beyond a reasonable doubt, the guilt of the defendant. The defendant and his attorney, functioning within the adversary system, neither desire to, nor are required to, aid the prosecution in the execution of its task. The attorney, owing undivided fidelity to his client, should not turn the evidence in to the prosecutor. If the client wishes to enter a not guilty plea and place the burden upon the state to prove its case, the attorney has no obligation voluntarily to offer to the state incriminating evidence known to exist.

Furthermore, assuming the client admitted his guilt in confidence, if the attorney were to turn in the evidence, such action would be objectionable because of the same policy considerations which justify the attorney-client privilege. If the attorney could turn in any incriminating evidence against the will of his client, the client would hesitate to reveal all relevant information to him and thus frustrate the spirit of his constitutional right to counsel. The client would feel betrayed since the attorney knew of the incriminating evidence only because the client told him of its existence under assurances of nonprejudice to the client's cause. The same policy which supports the obligation of confidentiality precludes the attorney from prejudicing his client's interest in any way because of knowledge gained in his professional capacity.

The attorney cannot tell his client to dispose of the evidence entirely. In *Clark*

---

[45] *See* C. CURTIS, IT'S YOUR LAW 1-5 (1954).

*v. State*,[46] the court held admissible the testimony of a telephone operator who overheard the conversation between the accused murderer and his attorney, wherein the client admitted his guilt and the attorney advised him to get rid of the murder weapon. While discussing the nature of the attorney-client privilege, the court noted the well established exception to the privilege. Public policy strongly demands that no protection be afforded the communications between attorney and client when advice as to how the client may commit a crime is sought.[47] The court stated, in denying defendant's motion for a rehearing:

> We think this . . . rule must extend to one who, having committed a crime, seeks or takes counsel as to how he shall escape arrest and punishment, such as advice regarding the destruction or disposition of the murder weapon or of the body following a murder.[48]

The court refused to hold that the advice was incidental to the preparation of the client's legitimate defense,[49] and sarcastically suggested that if the attorney were to be called to the witness stand and asked questions, he would more appropriately assert his fifth amendment right rather than the attorney-client privilege.[50]

The only course of action open to the attorney is to outline the status of the law in the area and let the client decide what to do with the evidence. He should mention the unfavorable effect that discovery of the evidence would have, and his legal and ethical inability to take possession of the items. The argument can be made that the suggestion is tantamount to telling the client to destroy the evidence. In rebuttal, it can be said that the attorney should not presume that the client will improperly use the legal advice given. It should be remembered that it is the client who is hiring the attorney and he is entitled to have legal information and to make his own decision as to how to act upon it. The lawyer should not be paternalistic towards the client and assume that he will imprudently act upon his newly discovered legal knowledge. The lawyer has the obligation to furnish the client with all legal information which is relevant and the client has the right to possess it. It is a basic doctrine of law that all are presumed to be knowledgable as to its contents, and it would be odd, indeed, if the attorney were ethically bound not to enable this legal fiction to become a reality because of the possibility that a more sophisticated comprehension of the law might invite improper use of its loopholes by the client. If such a fear exists, indeed, all law schools should close their doors because the student's extensive familiarity with the law will invite unscrupulous application of it to his own advantage.

Furthermore, the client who seriously believes the pronouncements of the profession concerning the privilege of confidentiality will be unjustly penalized for revealing to the attorney the existence of this evidence if the attorney will subse-

---

[46] 159 Tex. Crim. 187, 261 S.W.2d 339, *cert. denied*, 346 U.S. 855 (1953).
[47] *Id.* at 199, 261 S.W.2d at 347.
[48] *Ibid.*
[49] *Ibid.*
[50] *Ibid.*

quently hesitate in informing the client of the legal principles involved.

These remarks are offered as a suggested course of action which an attorney in defendant's position should take in light of the holding in the instant case. But, it should be noted that prior to this holding, defendant had carefully evaluated his contemplated course of action and sought the advice of several prominent members of the profession. These men, whose judgment is not to be taken lightly, basically approved of defendant's plan. Defendant's reward for his diligent efforts was an eighteen-month suspension. This case should emphatically demonstrate the need for a more precisely drafted code.

It is also submitted that additional canons should be drafted to deal specifically with the activities of the criminal lawyer. The gravity of the issues involved in a criminal case, plus the special consideration generally given defense lawyers in criminal cases, militate towards an explicit recognition of the distinction by the Canons.

## ENTRAPMENT

*(Continued)*

rule would seem a clearly insufficient basis on which to ground the application of the defense in New York.

Another inadequacy in the new entrapment section is the failure to establish a strong policy to guide the courts. Such a policy is essential to the procedural determinations which will have to be made when the defense is pleaded. An example of the necessity for a consistent policy is the problem, previously discussed, of the extent to which evidence showing predisposition will be allowed. If the section is directed primarily at the misconduct of the police, then the disposition of the defendant to commit a crime is at best a secondary issue and the evidence presented on this question will be limited. On the other hand, if the conduct of the police merely forms the basis of the defense, then any evidence having bearing on the defendant's predisposition must be admitted. It is to this extent that a definitive policy statement is of paramount importance. The defense of entrapment has been available in federal proceedings for over half a century without a final resolution of the more difficult questions involved in its use. This must not be allowed to become the case in New York.

## VATICAN II

(*Continued*)

J.A. Hardon, S.J., *Cooperation of Church and State in American Legislation*, 57 THE HOMILETIC AND PASTORAL REVIEW 309 (1967).

J.A. Hardon, S.J., *Cooperation of Church and State in the Supreme Court*, 57 THE HOMILETIC AND PASTORAL REVIEW 419 (1967).

J.A. Hardon, S.J., *Cooperation of Church and State in American Education*, 57 THE HOMILETIC AND PASTORAL REVIEW 523 (1967).

D.R. Russell, *English and American Democracy and The Papacy*, 72 THE DOWNSIDE REVIEW 30 (1953-4) (reprinted in THE CATHOLIC MIND 338 (1954)).

Cardinal Augustin Bea, *Religious Freedom*, THE CATHOLIC MIND 4-15 (1964).

Bennet, *A Protestant Views Religious Liberty*, 201 THE CATHOLIC WORLD 362 (1965).

Canavan, *The Declaration on Religious Liberty*, AMERICA, Nov. 20, 1965 at 635. *See also* Canavan, *Church, State, and Council*, ECUMENISM AND VATICAN II 44-62 (O'Neill ed. 1964).

Giacchi, *Freedom of Religion and the State*, 11 CATHOLIC LAW. 271 (1965).

Sheerin, C.S.P., *The Nature of Religious Liberty*, 201 THE CATHOLIC WORLD 356 (1965).

## IN OTHER PUBLICATIONS

(*Continued*)

In seeking to attain the application of the equal protection clause to the laws on illegitimacy, the author advocates that, at one end of the spectrum of legislation, the illegitimate should be given all the support rights of a legitimate child. The other extreme would be paternal affection, a matter which the author feels cannot be legislated in the illegitimate's favor. Other matters of legislation, such as intestacy, welfare, and the use of the paternal name would fall somewhere in between.

The author's argument for legal equality for illegitimates is a convincing one. The child is an unwitting victim of a situation over which he could exercise no control. There seems little justification for punishing him for this fact by giving him second-class legal rights. Although he will never be free of social stigma, there is no sound justification for denying him the legal rights of all citizens. While Mr. Krause's explanation of the "real" reason for discriminatory legislation is somewhat oversimplified, it seems clear that an illegitimate child's rights outweigh other considerations for such discriminatory legislation.